THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH NORTH, SS. 06-E-201
NORTHERN DISTRICT

Jeffrey Stone

v.

New England Document Systems, Inc.
f/k/a New England Micrographics, Inc.

v.

Jeffrey Stone and
Document Archives and Imaging, LLC

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Jeffrey Stone ("Stone") initially instituted this action against defendant New England Document Systems, Inc., f/k/a New England Micrographics, Inc. ("N.E. Docs")[1] for breach of contract, compelled payment of dividends, freeze-out of a minority shareholder, and judicial dissolution of the corporation. N.E. Docs interposed counterclaims, and moves for judgment on the pleadings as to most of Stone's claims, and also seeks costs and attorney's fees. Stone objects. The Court held a hearing on October 23, 2006. Upon consideration of the parties' oral arguments and written submissions, and as described below, N.E. Docs' motion is GRANTED only as to Stone's first breach of contract claim, and his judicial dissolution claim, and no award of costs and attorney's fees is entered.

[1] The Court refers to the defendant as "N.E. Docs" even for periods it may have been known as New England Micrographics, Inc.

For the limited purpose of ruling on the pending motion, the Court accepts or assumes the following pertinent circumstances. N.E. Docs is a closely held corporation with three present shareholders: Stone, Nicholas Brattan ("Brattan") and Donald Forst ("Forst"). Stone first became a shareholder in 1991, when, as an employee of N.E. Docs, he purchased stock in the corporation. Pet. for Dividends, Bonuses, Share Buy-Back, and/or Dissolution of the Corporation, at 2 ("Pet."). He signed and entered into an agreement or agreements, in about 1991 or at other times, which he claims entitle him to have his shares of stock bought back, or redeemed, at a price determined by a formula. Mot. to Amend. Pet. at 2.

On May 22, 1995, the three shareholders entered into a shareholders' agreement which Stone claims was drafted by Forst, one of the majority shareholders. The agreement, titled "Agreement Between the Shareholders of New England Micrographics, Inc. and FBS Realty, Inc," states that "all of the shareholders of both corporations, having agreed to actively participate in the business of MICROGRAPHICS and COMERICIAL PROPERTY RENTAL as employees . . . hereby enter into this agreement." Def.'s Mem. in Support of Mot. for J. on Pleadings, Ex. A ("Def.'s Mem.")[2] The agreement states that N.E. Docs "shall collectively remunerate [with another corporate entity] the shareholders for their services as employees as follows:" and then lists two headings, "ANNUAL SALARY" and "ANNUAL BONUS." Under the heading "ANNUAL SALARY,"

[2] The Court notes that the 1995 agreement is partially cited in Stone's Petition, and is referred to extensively in N.E. Docs' Answer, with a full copy attached as Exhibit D. to N.E. Docs' Answer, Affirmative Defenses And Counterclaims.

the agreement lists specific dollar amounts for the salaries of Forst, Brattan, and Stone from the years of 1995 to 1999. No numbers are listed under the heading "ANNUAL BONUS," but that section reads "[t]he annual bonus determined by the Treasurer prior to the close of each fiscal year, shall be equal for all three parties to this agreement. No distinction should be made for any reason." Id.

In 2002, Stone was terminated from his employment at N.E. Docs, or as he alleges, was "forced" out. Pet. at 3. The corporation has not paid him any bonus or dividend since his termination, although the other two shareholders have received bonuses of $190,000 each since 2002. Id. at 3, 5. Brattan and Forst have also received loans and advances from the corporation. The corporation has offered to buy back Stone's stock at a price he claims to be inadequate and far below the price required by the parties' pertinent agreement or agreements. Pet. at 6-7. Stone claims that as late as the 2006 annual shareholders meeting, the corporation had failed to purchase his shares pursuant to a previously entered into agreement or agreements, and also has failed to pay him bonuses or dividends. See Mot. to Amend Pet. at 2; Pet. at 3-4.

Against this claimed factual backdrop, Stone filed this present suit against N.E. Docs, alleging breach of contract because N.E. Docs has failed to pay him since 2002 the bonuses promised in the 1995 agreement, and that Brattan and Forst have "frozen" him out of the corporation. He also seeks to compel dividends or distributions and to judicially dissolve the corporation based on

illegality.[3] N.E. Docs seeks judgment on the pleadings as to these claims and costs and attorney's fees.

"In general, a motion seeking judgment based solely on the pleadings is in the nature of a motion to dismiss for failure to state a claim." Jenks v. Menard, 145 N.H. 236, 239 (2000). "The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Dobe v. Comm'r, N.H. Dep't of Health and Human Servs., 147 N.H. 458, 460 (2002) (citations and internal quotations omitted). The Court assumes the truth of the facts alleged in the plaintiff's pleadings and construes all reasonable inferences in the light most favorable to the plaintiff. Id. (citations omitted). The Court will grant a motion to dismiss "if the facts pled do not constitute a basis for legal relief." Thorndike v. Thorndike, __ N.H. __, __ (Slip Op. *3) (Nov. 30, 2006) (citing Perez v. Pike Inds., 153 N.H. 158, 159-160 (2005)).

The Court will address the defendant's motion to dismiss each claim in turn below.

I. BREACH OF CONTRACT

N.E. Docs moves for judgment on the pleadings as to Stone's first breach of contract claim, arguing that the 1995 agreement upon which it is based does not entitle Stone to the annual bonuses he claims. It maintains that "the proper interpretation of a contract . . . is a question for the court," and that the plain or common meaning of the words used should govern any interpretation. Def.'s

[3] The Court observes that it does not here consider Stone's second breach of contract claim as asserted through his amendment to his Petition.

Mem at 5 (citing Baker v. McCarthy, 122 N.H. 171, 174-175 (1982)). It argues that the Court should find the plain language of the 1995 agreement only entitled Stone to bonuses while he was an employee, and that, since Stone left employment at N.E. Docs in 2002, he would not be entitled to bonuses after that year. Further, N.E. Docs submits that, since the face of the contract lists annual salaries only from years 1995-1999, "the contract expired by its on terms at the end of 1999." Id. at 6.

Stone objects, based on two grounds. Pl.'s Obj. at 5, 9. He claims that the plain language in the contract demonstrates that he is entitled to bonuses if the other shareholders are given bonuses, as it states, "no distinction should be made for any reason." Id. at 6. Further, he asserts that only the salary provisions expired in 1999, so the remainder of the contract remains in effect. In the alternative, he argues that the contract is ambiguous, and thus a dispute exists as to the party's intent concerning the terms which must be left for the trier of fact. Id. at 5, 9. Stone argues that when he entered into the contract, he intended to have this contract govern his rights as a shareholder and that the salary and bonuses were essentially the dividends provided by the company. Further, he claims when a contract is ambiguous, it should be construed against the drafter.

"[T]he proper interpretation of a written agreement is ultimately a question of law for . . .[the] court." Gen. Linen Serv., Inc. v. Franconia Inv. Assoc., L.P., 150 N.H. 595, 597 (2004) (citation omitted). "In reviewing a contract . . .[the court] will give its language the interpretation that best reflects the parties'

intentions." Rest. Operators, Inc. v. Jenney, 128 N.H. 708, 710 (1986) (citation omitted). "Absent fraud, duress, mutual mistake, or ambiguity, . . .[the court] must restrict . . .[its] search for the parties' intent to the words of the contract." Sherman v. Graciano, 152 N.H. 119, 121-22 (2005). The Court must "give the language used by the parties its reasonable meaning, considering the circumstances and context in which the agreement was negotiated, when reading the document as a whole . . . . from the plain meaning of the language used." General Linen Services, 150 N.H. at 597 (citations omitted).

> In construing a contract . . . we must assume that the words used were used advisedly and for the purpose of conveying some meaning. Words are only to be ignored or regarded as surplusage when to do otherwise would be either to render the document insensible or else to produce a result obviously at variance with its clear intention or purpose.

Thiem v. Thomas, 119 N.H. 598, 603 (1979) (citing McGinley v. John Hancock Mt. Life Ins. Co., 88 N.H. 108, 111 (1936)).

"[W]hether a contract term is ambiguous . . . is ultimately a question of law for . . .[the] court to decide." Sherman, 152 N.H. at 121. "Only when the parties reasonably disagree as to its meaning will the agreement's language be deemed ambiguous." General Linen Serv., 150 N.H. at 597. "When there is a question of fact concerning what was intended by certain terms within a contract, the dispute is to be resolved by the trier of fact. . . ." Holl d/b/a B.J. Bricker's Restaurant v. Claremont Associates, 143 N.H. 563, 565 (1999) (citing R. Zoppo Co. v City of Dover, 124 N.H. 666, 671 (1984)). However, "no presumptions are to be indulged . . . either for or against a party who draws an agreement." Thiem, 119

N.H. at 602 (citing Aldrich v. Charles Beauregard & Sons, 105 N.H. 330, 336 (1964)).

Upon review of the shareholders' agreement, the Court finds that Stone's allegations, when measured against the actual 1995 agreement, are not "reasonably susceptible of a construction that would permit recovery." See Dobe, 147 N.H. at 460. The plain meaning of the language and grammar used in the 1995 agreement demonstrates the parties' intent that the entire agreement governs the parties' rights as employees. See Gen. Linen Serv., 150 N.H. at 597. To begin with, the agreement states that N.E. Docs "shall collectively remunerate [with another related corporate entity] the shareholders for their services *as employees* as follows:" Def.'s Mem., Ex. A (emphasis added). Immediately following this colon are two section headings labeled "ANNUAL SALARY" and 'ANNUAL BONUS," both written in the same font and identically centered. This use of the colon, followed by two sections formatted in an identical fashion, indicates that compensation for the shareholders as employees was meant to include both sections. See Gen. Linen Serv., 150 N.H. at 597. This interpretation comports with the plain meaning of the word "bonus," which, especially in conjunction with the word "salary," typically means an additional compensation above an articulated salary to an employee. Considering the grammatical layout of the contract and the plain meaning of the language used, the Court sees no justification for divorcing the "ANNUAL BONUS" section from the remainder of the contract, as Stone's interpretation would require. Thus, the

Court finds that the contract is not ambiguous, and Stone's interpretation of the contract is without merit.

Further, the Court finds that the contract expired by its own terms in 1999. The agreement lists the specific salary amounts for Forst, Brattan and Stone for the years of 1995 to 1999, with each salary increasing throughout the years. Def.'s Mem., Ex. A. As the Court shall "assume that the words were used advisedly and for the purpose of conveying some meaning," the shareholders must have inserted the years of 1995 to 1999 for some specific reason. See Thiem, 119 N.H. at 603. Logically, the inclusion of salary amounts only for these years indicates that the drafters intended the contract to expire at the end of 1999, and that the salaries would to be renegotiated at that time. To find otherwise would be to ignore the insertion of the years 1995-1999, which is only appropriate "when to do otherwise would be either to render the document insensible or else to produce a result obviously at variance with its clear intention or purpose." Id. Here, interpreting the contract to expire in 1999 renders neither result. Further, as the Court must "read[] the document as a whole," the expiration date must also apply to other sections, such as the "ANNUAL BONUS" section. Gen. Linen Serv., 150 N.H. at 597. Therefore, N.E. Docs' motion in regard to Stone's first breach of contract claim is GRANTED.

II. **COMPELLED DISTRIBUTION OF DIVIDENDS**

N.E. Docs moves for judgment on the pleadings as to Stone's claim for compelled dividends, arguing that Stone has not alleged sufficient facts to

support his claim. N.E. Docs maintains that declaring dividends is typically a matter of the board's discretion, and that generally a court should not intervene unless the corporation has acted fraudulently, in bad faith, or in abuse of discretion. See Def.'s Mem. at 8. N.E. Docs further argues that Stone has not alleged facts that show bad faith or fraud, but merely made conclusory statements of law. Id. at 8-9.

Stone responds that he has sufficiently alleged that N.E. Docs acted in bad faith so as to mandate the declaration of dividends. See Pl.'s Obj. at 9-10. He submits that he has alleged self dealing by Brattan and Forst, as they have taken loans from the corporation and received favorable salaries. Further, he alleges that N.E. Docs has failed to pay Stone any dividends because of ill-will. Id. at 11. Stone further states that he will be unable to make more specific allegations before discovery is completed. Id. at 12.

Under RSA 293-A:6.40, "A board of directors may authorize, and the corporation may make, distributions to its shareholders. . ." While the New Hampshire Supreme Court has not discussed in what situations judicially compelled dividends are appropriate, the general rule is "whether or not dividends shall be paid, and the amount of the dividend at any time, is primarily to be determined by the directors. . . ." Gordon v. Elliman, 119 N.E.2d 331, 334 (N.Y. 1954) (citing 11 Fletcher's Cyclopedia Corporations, § 5325). Therefore, a shareholder seeking compelled dividends faces a heavy burden. "To justify judicial intervention in cases of this nature, it must, as a general proposition, be shown that the decision not to declare a dividend amounted to fraud, bad faith or

an abuse of discretion on the part of the corporate officers authorized to make the determination." Gay v. Gay's Supermarkets, Inc., 343 A.2d 577, 580 (Me. 1975) (citations omitted). "The essential test of bad faith is to determine whether the policy of the directors is dictated by their personal interests rather than the corporate welfare." Gottfried v. Gottfried, 73 N.Y.S.2d 692, 695 (N.Y. Sup. Ct. 1947).

> There are no infallible distinguishing ear-marks of bad faith. The following facts are relevant to the issue of bad faith . . . Intense hostility of the controlling faction against the minority; exclusion of the minority from employment by the corporation; high salaries, or bonuses or corporate loans made to the officers in control . . . the existence of a desire by the controlling directors to acquire minority stock interests as cheaply as possible.

Id. However, if the corporation can persuasively and credibly put forward "plausible business reasons" as to why it issued no dividends, courts should not interfere, as "[i]t is . . . [the court's] duty to redress wrongs, not to settle competitive business interests. . . . [and] [a]bsent any bad faith, fraud, breach of fiduciary duty or abuse of discretion, no wrong cognizable by or correctable in the Courts has occurred." Gay, 343 A.2d at 580.

The Court finds Stone has alleged sufficient instances of bad faith, such that his claim for compelled dividends is "reasonably susceptible of a construction that would permit recovery." See Dobe, 147 N.H. at 460. To be sure, Stone makes conclusions of law in his petition, which "need not be accepted as true on a motion to dismiss." Provencal, v.Vermont Mut. Ins. Co., 132 N.H., 742, 745 (1990). However, Stone also asserts many of the facts that tend to prove bad faith under Gottfried: that Brattan and Forst forced him to

terminate his employment, that they both have enjoyed remuneration to his disadvantage, and that they have received favorable loans and advances from N.E. Docs not in any form available to him. See Gottfried, 73 N.Y.S.2d at 695. Further, Stone alleges that Brattan and Forst attempted to buy his shares back at an inadequate price. See id. Assuming the truthfulness of these alleged facts, Stone has advanced sufficient facts showing that "the policy of the [shareholders] is dictated by their personal interests rather than the corporate welfare." See id. "[T]est[ing] the facts in the complaint against the applicable law," the Court finds these alleged facts are sufficient to demonstrate bad faith so as to allow the claim for compelled dividends to go forward. See Provencal, 132 N.H. at 745; Gottfried, 73 N.Y.S.2d at 695. Accordingly, N.E. Docs' motion as to this claim is DENIED.[4]

III. **FREEZE-OUT CLAIM**

As a preliminary matter, the Court notes that the New Hampshire Supreme Court has never explicitly adopted the tort of corporate freeze-out, although it has assumed the existence of such a tort *arguendo*. Thorndike, __ N.H. __, __ (Slip Op. *3); Kennedy v. Titcomb, 131 N.H. 399, 403 (1989). The Court will follow suit and consider N.E. Docs' motion assuming, without deciding, that a tort of a freeze-out in some form does exist in New Hampshire. [5]

[4] In a footnote, N.E. Docs claims that Stone failed to make his claim for compelled dividends based on fraud with particularity. Def.'s Mem. at 9. However, as described above, Stone appears to rest his claim for compelled dividends upon allegations of bad faith, more than fraud. In any event, and in the present context, the Court declines to insist here on further pleadings in respect to fraud.

[5] The Court also notes that Stone has not named Bratton and Forst as defendants, and that N.E. Docs has not challenged Stone's freeze-out claim on that basis.

A. Statute of Limitations

N.E. Docs first seeks dismissal of Stone's freeze-out claim on the basis of the statute of limitations. It principally argues that Stone's alleged injury first occurred in August, 2002 when N.E Docs terminated him, see Def.'s Mem. at 10, and inasmuch as the statute of limitations would be three years from the August, 2002 termination, and Stone did not file suit until May of 2006, Stone's claim is time-barred. Id. at 11

Stone objects, arguing that his claim was timely because the "capstone" of the majority's plan to freeze out Stone was N.E. Docs' inadequate offer to buy back his stocks. Pl.'s Obj. at 16. Stone maintains that the "capstone" of the plan to freeze out a minority shareholder is the injury which causes a freeze-out claim to accrue. N.E. Docs made this offer, he claims, in December of 2003, and thus Stone's suit, filed in May of 2006, is within the three year statute of limitations.

In New Hampshire, a claim accrues such as here involved generally when the claimed tortious act occurs, but subject to the discovery rule. See RSA 508:4. If a defendant seeks to dismiss the action against him based on the statute of limitations, he or she has the burden of showing that an action "was not brought within 3 years of the act or omission complained of." Glines v. Bruk, 140 N.H. 180, 181 (1995) (citing RSA 508:4) (internal quotations omitted). Then, "the plaintiff has the burden of raising and proving that the discovery rule is applicable to an action otherwise barred by the statute of limitations." Id.

Assuming the existence of the freeze-out tort *arguendo*, the New Hampshire Supreme Court has stated, "if a minority shareholder can allege specific facts showing that the majority shareholders have embarked upon a plan to freeze-out the minority from their rightful benefits, a cause of action may accrue." Kennedy, 131 N.H. 402 (citations omitted). However, a freeze-out claim has been held to not be a continuing tort, and thus, "a cause of action for freeze-out [arises] at a specific time . . . [when] the acts causing the …petitioner's injuries occurred…." Thorndike, __ N.H. __, __ (Slip Op. *4). Thus, a plaintiff must assert facts or events that, by themselves, advance a timely freeze out cause of action, one which accrues within the period of limitations, where the majority takes action to squeeze the minority out of rightful benefits. See id. The exact time of injury will vary, depending on the facts of the specific case. See Thorndike, __ N.H. __, __ (Slip Op. at *2, *4) (finding untimely presented freeze-out claim which accrued prior to February 18, 2002 when petitioner's voting power was diluted, he was denied a salary, and forbidden to participate in the business); Houle v. Low, 556 N.E.2d 51, 53 (Mass. 1990) (claim accrued when plaintiff "was informed of the vote not to invite him to participate in a new business venture"); Kirley v. Kirley, 521 N.E.2d 1041, 1043 (Mass. App. Ct. 1988) (finding that action accrued when corporation terminated the plaintiff's employment and deprived him of his corporate office); see also Roemmich v. Eagle Eye Development, LLC, 389 F. Supp.2d 1089, 1092, 1094 (D.N.D. 2005) (finding that freeze-out-type claims accrued separately).

The Court finds that N.E. Docs, by its present motion, has failed to meet its burden of showing that Stone has filed suit outside of the statute of limitations, in regard to the freeze-out claim he advances. See Glines, 140 N.H. at 181. To be sure, the termination of Stone took place more than three years before Stone initiated this present action, and thus, if Stone based his freeze-out claim on the termination, his claim would be barred. See Wilkes v. Springside Nursing Home, 353 N.E.2d 657, 662-63 (Mass. 1976) (finding a freeze-out claim can be based on depriving minority shareholder of employment or corporate offices). However, Stone alleges that the majority shareholders of N.E. Docs had a plan to exclude him from reaping any benefit from his investment in the corporation, with the "capstone" of the plan (or the time the alleged freeze-out injury occurred and was realized) being the inadequate offer to purchase back his stock in December of 2003. This allegation of an inadequate offer may be considered the basis for a "freeze-out claim" if the plaintiff can prove this offer was part of a plan to squeeze Stone out of corporate benefits.[6] While a freeze-out claim is not a "continuing tort," and, as a consequence, and, for example, the termination-related circumstances, may not here be considered as a "freeze-out" being time-barred, it is conceivable that events occurring within the period of limitations may themselves constitute a freeze-out. See Thorndike, ____, N.H. ____, ____ (Slip Op. at 5); Kennedy, 131 N.H. at 403; Donahue v. Rodd Electrotype Co. of New England, Inc. 328 N.E.2d 505, 515 (Mass. 1975).

[6] In this regard, the Court observes that the relief Stone seeks as to the freeze-out claim relates to the purchase, or buy back, of his shares by N.E. Docs. See Pet. at 7.

To be sure, N.E. Docs claimed at hearing that it made offers to Stone between the time of his termination at N.E. Docs and the December 2003 offer. Nonetheless, and in the present posture of this case, N.E. Docs' motion, as based on the statute of limitations, is DENIED.

B. Freeze – Out

N.E. Docs further argues that Stone's freeze-out claim should be dismissed because Stone has not alleged specific facts sufficient to support a freeze-out claim under New Hampshire law. See Def.'s Mot. at 13. In this regard, N.E. Docs maintains that Stone has advanced conclusory statements that he was denied rightful employment and dividends, without stating more precisely why he would be entitled to such things, and he has claimed N.E. Docs offer to buy back stock was inadequate, without alleging in more detail why it was insufficient. Id. Further, N.E. Docs appears to claim that to sufficiently allege a freeze-out claim, based on Massachusetts precedent, Stone must assert many more allegations such as that N.E. Docs lacked a legitimate reason to fire him, and that Stone's stockholding was strongly tied up with his employment. Stone objects, arguing that he has alleged specific facts to make out a freeze-out claim under New Hampshire law.

Generally, shareholders in corporations owe no duty to one another. However, noting the "fundamental resemblance of a close corporation to a partnership," the Supreme Judicial Court of Massachusetts has held that shareholders in a close corporation owe each other the same duty of "utmost good faith and loyalty" as partners owe each other. Donahue, 328 N.E.2d at 515.

That Court has also held that shareholders in a close corporation may not act "out of avarice, expediency or self interest in derogation of their duty of loyalty to the other stockholders and to the corporation." Id. This higher duty of loyalty is justifiable based on the plight of oppressed minority shareholders, because they have no market to sell their stock in to extricate their investment, and may be "compelled . . . to relinquish stock at inadequate prices." Id.

Based on this fiduciary duty, minority shareholders in close corporations have been permitted, under at least Massachusetts precedent, to bring "freeze-out" claims against the majority where " the majority shareholders have embarked upon a plan to freeze-out the minority from their rightful benefits." Kennedy, 131 N.H. 402 (citing Sugarman v. Sugarman, 797 F.2d 3, 8 (1st Cir. 1986)). Under Sugarman, the minority shareholder

> must first establish that the majority shareholder employed various devices to ensure that the minority shareholder is frozen out of any financial benefits from the corporation through such means as the receipt of dividends or employment, and that the offer to buy stock at a low price is the 'capstone of the majority plan' to freeze out the minority.

Sugarman, 797 F.2d at 8 (citing Donahue, 328 N.E.2d at 515). Other techniques to freeze out a defendant may include "drain[ing] off the corporation's earnings in the form of exorbitant salaries and bonuses to majority shareholders," or "caus[ing] the corporation to sell its assets at an inadequate price to the majority shareholders." Donahue, 328 N.E.2d at 513.

Whatever the techniques alleged to freeze out the minority shareholder, the Court must "carefully analyze the action taken by the controlling stockholders in the individual case. It must be asked whether the controlling group can

demonstrate a legitimate business purpose." Wilkes, 353 N.E.2d at 663 (citations omitted). Courts have recognized that

> the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation. It must have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees.

Id. When a legitimate business purpose is asserted by the majority, the minority shareholders can still prevail by "demonstrat[ing] that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest." Id. (citations omitted).

Assuming the existence of the freeze-out tort, the New Hampshire Supreme Court has stated that a freeze-out claim can survive a motion to dismiss "if a minority shareholder can allege specific facts showing that the majority shareholders have embarked on a plan to freeze-out the minority from their rightful benefits." Kennedy, 131 N.H. at 402. In Kennedy, the New Hampshire Supreme found that the plaintiff had not alleged a sufficient claim when he had merely asserted that he was subject to a freeze-out plan, and that the defendant had paid other shareholders more for their stock than he offered the plaintiff. The Court found that

> had the plaintiff alleged that the defendant was being paid in excess of the value of his services, or that the plaintiff was wrongfully being denied dividends, or that there were other actions being taken to deny him the benefits of stock ownership, then the plaintiff would arguably have stated a cause of action.

Id. at 403. This statement makes clear that a plaintiff must specifically allege the pertinent acts that, if proven, would show a plan to freeze the plaintiff out. See id. It is only necessary, however, that a plaintiff sufficiently outline the freeze-out claimed to be involved.

Against this backdrop, the Court finds that Stone's freeze-out "allegations are reasonably susceptible of a construction that would permit recovery." See Dobe, 147 N.H. at 460. Stone has alleged that Brattan and Forst had a plan to freeze him out of the corporation. See Pet. at 6. The Petition states that they have terminated his employment and failed to award him dividends while the other two shareholders have received compensation and loans from the corporation. Id. at 6. He further alleges that the "capstone" of the majority shareholders plan was N.E. Docs' offer to buy back his shares at an inadequate price. Id. at 6-7. As Stone has done more than what was done in Kennedy, and has alleged a specific "freeze-out" applied against him, he has adequately alleged his claim. See Kennedy, 131 N.H. at 402-403.[7]

Contrary to N.E. Docs' arguments, Stone need not allege specific details such as why his termination was not wrongful, or why N.E. Docs' offer to buy back his stock was inadequate, or that Stone's employment was conditioned on his ownership of stock or any of the other details it claims are necessary. See Def.'s Mot. at 13, 16. A freeze-out claim need not be pled with such particularity. Stone has provided a sufficient outline of the facts which, if true, would provide a

[7] The Court notes that it does not here deal with the circumstance that Stone has not sought relief directly against Brattan and Forst.

basis for relief. Many of the matters which N.E. Docs claims Stone must allege are not required to establish it at this threshold stage.

IV. **JUDICIAL DISSOLUTION**

The defendant also moves for judgment on the pleadings as to Stone's claim of judicial dissolution. N.E. Docs argues that New Hampshire law only allows dissolution if the directors act in a manner that is illegal or fraudulent, which differs from the Model Act which allows dissolution also for "oppressive" behavior. See Def.'s Mem. at 16-17. Submitting that the term "illegal" only covers criminal conduct, N.E. Docs argues that Stone cannot and has not alleged behavior sufficient to merit dissolution. Id. at 17. Further, N.E. Docs submits that since dissolution requires allegations of fraud or illegal conduct, Stone would be required to plead this claim with particularity, and his complaint does not do so. Id. Lastly, it claims that Stone did not plead the essential details of the conduct on which dissolution is warranted, and merely made conclusory statements. Id.

Stone objects, arguing that "illegal behavior" should include the actions he alleges in his complaint, primarily that the majority froze him out. See Pl.'s Obj. at 17. He claims that since "illegal" is not defined in pertinent statute, the dictionary definition of illegal is sufficiently broad to include any conduct that is "not authorized by law," such as a freeze-out claim. Id. Further, Stone alleges that he did plead fraudulent behavior in his petition with sufficient particularity. Id. at 19.

The Court first turns to whether Stone's allegations support a claim for dissolution based on illegal conduct. RSA 293-A:14.30 (b) states, "The superior

court may dissolve a corporation . . . [i]n a proceeding by a shareholder if it is established that . . . [t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal or fraudulent." The statute does not define "illegal" or "fraudulent" actions, and the New Hampshire Supreme Court appears not to have addressed the definitions of these terms in the specific statute at issue.[8] "In matters of statutory interpretation, we turn first to the plain meaning of the words used." Larose v. Superintentant, Hillsborough County Corr. Admin., 142 N.H. 364, 366 (1997). Webster's Third New International Dictionary defines "illegal" as "contrary to or violating a law or rule or regulation or something else (as an established custom) having the force of law." Webster's Third New International Dictionary, 1126, 1993. While this definition encompasses more behavior than criminal conduct, it still does not resolve whether conduct which gives rise to a freeze-out tort would be considered "illegal."

The history and context of RSA 293-A:14.30 (b) suggests that the legislature did not intend "illegal" to generally include conduct involving a civil liability freeze-out claim. RSA 293-A:14.30 (b) appears to have been much influenced by the Model Business Corporation Act, promulgated by the American Bar Association. The Model Act provides that a court may dissolve a corporation "in a proceeding by a shareholder if it is established that: "the directors or those

[8] In Chadbourne.v. Town of Newcastle, 48 N.H. 196, 199 (1868) the New Hampshire Supreme Court defined the term "'illegal" as "something 'unlawful', 'contrary to law'." There, the Supreme Court dealt with the term as it was used in a statute providing a cause of action against a town or city in connection with property destroyed by a mob. The statute, however, did not allow for recovery if the destruction was caused by the plaintiff's "illegal or improper conduct." However, the Court offered its definition of "illegal" in a very different context than the corporations statute, though it recognized a distinction between "illegal" and "improper" conduct.

in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent." See MODEL BUSINESS CORPORATION ACT, § 14.30 (3d Ed. 2005) While prior to 1993, the State's pertinent statute as to judicial dissolution tracked the Model Act as to those grounds, the Legislature amended the statute in 1993, deleting the term "oppressive." [9] The Official Comment to the Model Act does not define the terms "illegal," "fraudulent," or "oppressive." However, a number of other states, like the Model Act, allow for the dissolution of a corporation based on "illegal" or "oppressive" acts, and their interpretation of these two grounds is instructive.

While the Court is not aware of pertinent authority that has squarely defined the term "illegal," for purposes herein, other jurisdictions have looked at the term to include conduct which violates written statutes or codes. See Schirmer v. Bear, 672 N.E.2d 1171, 1177 (Ill. 1996); Thompson's Point, Inc. v. Safe Harbor Development, 862 F. Supp. 594, 601 (D. Me. 1994); Abrams v. Oliver Schools, Inc., 206 A.2d 143, 146 (N.Y. App. Div. 1994).[10] For example, in Schirmer v. Bear, the Illinois Supreme Court approved a trial court's findings that a corporation had acted "illegally" when it had failed to provide statutorily required notice of a shareholder's meeting, and removed the plaintiff from office in a manner that violated a state statute. 672 N.E.2d at 1177. The Court has been unable to find a decision in support of Stone's position that "illegal" includes

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[9] See Footnote 11 for a discussion of the legislative history.

[10] However, it seems that dissolution may not be a proper remedy for all "kinds of illegality." Thompson's Point, 862 F. Supp. at 601.

conduct that expressly does not violate a statute but would nonetheless give rise to a tort.

Further, the Model Act's inclusion of "oppressive" conduct as a ground for dissolution supports that freeze-out behavior, as alleged here, is not "illegal" for purposes of RSA 293-A:14.30. Courts of other jurisdictions which have adopted all of the pertinent grounds included in the Model Act have noted that the inclusion of "oppressive" acts as a ground for dissolution, indicates that "oppressive" conduct differs from illegal or fraudulent conduct. See Edenbaum v. Schwarcz-Osztreicherne, 885 A.2d 365, 377 (Md. App. 2005); Jorgensen v. Water Works, Inc., 582 N.W.2d 98, 107 (Wis. Ct. App. 1998). Courts have defined "oppressive" as encompassing "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely," Edenbaum, 885 A.2d at 378 (citations omitted); or as involving "conduct [that] defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." In re Maybaum, 6 Misc.3d 1019 (A), *2 (N.Y. Sup. Ct. 2005) (citations). Under these definitions, courts have considered "oppressive" conduct to generally encompass behavior to freeze-out minority shareholders. Edenbaum, 885 A.2d at 378-379; Jorgenson, 582 N.W. 2d at 107 ("oppressive conduct of those in control is closely related to breach of the fiduciary duty owed to minority stockholders"); In re Maybaum, 6 Misc.3d 1019A,

*3 ("[o]ppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus . . . to prevent the minority shareholder from receiving a reasonable return on their investment").

Since other jurisdictions have defined "oppressive" conduct as including actions to "freeze out" the minority, such behavior may not properly be considered "illegal" under RSA 293-A:14.30. Plainly, the Model Business Corporation Act listed the terms "oppressive," "illegal" and "fraudulent" to indicate different types of behaviors as grounds for dissolution of a corporation.

As stated previously, while New Hampshire included "oppressive" behavior as a ground for dissolution prior to 1993, the New Hampshire Legislature omitted the term "oppressive" in its 1993 amendment of the law.[11] This clearly indicates the legislative intent to generally exclude "oppressive" conduct, such as freeze-out schemes as here alleged, as a ground for corporate

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[11] In 1992, the Senate Judiciary Committee sought to make major revisions to the State's corporate law, and in its original amendment bill, known as SB 308, deleted all three grounds for judicial dissolution. N.H.S. Jour. 827 –29 (1992). The Judiciary Committee apparently made this change because the old law allowed "somebody that is unhappy or dissenting [to] just literally, shut the corporation down." Id. At 829. Further, the sponsers of the bill apparently felt that minority shareholder's rights were protected in other ways, as they could remove directors who they believed were acting fraudulently. Id. At 828. "Dissolution would be too harmful a remedy, when shareholders, under the proposal, would also have their derivative rights, the right to remove directors, and various equitable rights." NEW HAMPSHIRE BUS. & INDUS. ASSOC., SUBCOMM. ON CORP. & SEC. LAWS, REVISED MODEL BUSINESS CORPORATIONS ACT/SB 308, ANNOTATIONS TO RSA 293-A, at 43 (1992). However, during debate on the bill, at least one Senator expressed disapproval of removal of these three grounds for dissolution, stating that the bill "removed those . . . conditions under which directors and officers in charge would be more strictly under control . . . I find that seems to be a real imbalance. " N.H.S. Jour 827 –28. SB 308 was referred to the House, which referred the bill to the House Judiciary Committee. Without recorded discussion, the House Judiciary Committee added amendments restoring the grounds of "illegal" and "fraudulent" as grounds for dissolution, but not "oppressive." JUDICIARY COMMITTEE, COMMITTEE REPORT SB 308, H. 92-2646, at 130 (1992). This then became law.

dissolution.[12] The Court should "not consider what the legislature might have said or add language that the legislature did not see fit to include." Cloutier v. City of Berlin, __ N.H. __, __ (Slip Op. *3) (Aug. 2, 2006). Further, this interpretation also squares with other courts' interpretation of "illegal," as freeze-out schemes often do not involve any violation of statutes. Since Stone claims that "the majority shareholders have acted unlawfully by . . . acting oppressively" as to Stone, he has not made allegations which would support dissolution of N.E. Docs based on "illegal" conduct. See Pet. at 7.

The Court next turns to whether Stone adequately alleged fraudulent actions of N.E. Docs with sufficient particularity. "It is well settled in this State that a writ alleging fraud must specify the essential details of the fraud." Jarvis v. Prudential Ins. Co. of America, 122 N.H. 648, 653 (1982) (citations omitted). "While the plaintiff need not establish fraud in his pleadings, in order to withstand a motion to dismiss the plaintiff must specify the essential details of the fraud, and specifically allege the facts of the defendant's fraudulent actions. It is not sufficient for the plaintiff merely to allege fraud in general terms." Procter v. Bank of New Hampshire, 123 N.H. 395, 399 (1983) (citations omitted). "The essence of fraud is a fraudulent misrepresentation." Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47 (1987) (citation omitted).

Stone has failed to allege fraud with specificity in his petition. See Pet. at 7. In fact, while the petition mentions that fraud may be a ground for dissolution,

[12] Certainly, there may be some overlap between "illegal" and "oppressive" conduct. As described above, such an overlap would likely occur when the majority's attempt to freeze-out the minority includes conduct that literally violates the legal code, such as holding shareholder

it specifically seeks to dissolve N.E. Docs because "[t]he majority shareholders have acted *unlawfully* by breaching their duties to Mr. Stone by acting oppressively in an effort to freeze Mr. Stone out of Micrographics' profits," Id. (emphasis added),[13] and, in his objection to the motion for judgment on the pleadings, Stone argues that Forst and Brattan's inadequate offer to buy back his shares constituted the fraudulent representation upon which dissolution should be granted. Pl.'s Obj. at 19. However, fraud must be pled with particularity *in the pleadings.* See Jarvis, 122 N.H. at 653. As Stone's petition does not specifically or sufficiently allege fraud, see Proctor, 125 N.H. at 399, N.E. Docs' motion as to the judicial dissolution claim is GRANTED; however, Stone is granted leave to file, within thirty days of the date of notice of this Order, an amended pleading containing the required particularity.

V. REQUEST FOR ATTORNEY'S FEES

The defendant requests attorney's fees, arguing that Stone has filed frivolous claims, and did so in bad faith. N.E. Docs alleges among other things that Stone is attempting to use this lawsuit as leverage to obtain more money for his stocks. Id. at 24-25. Stone objects, arguing that no evidence demonstrates his bad faith, and further, his claims are not frivolous.

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meetings without the statutorily required notice, or violating statutory voting requirements. See Schirmer, 672 N.E. 2d at 1177.

[13] Stone does allege, under his claim for compelled dividends, that "[t]he Respondents are acting fraudulently when they increase their collective salaries and appropriate the income so as to deprive Mr. Stone of reasonable dividends or distributions." Pet. at 5. However, as described above, Stone appears to assert in his Objection that Forst and Brattan's inadequate offer to buy back his stock is the main "fraudulent" act upon which dissolution should be granted. The lack of clarity in that regard further operates to support N.E. Doc's call for greater and clearer particularization.

"The general rule in New Hampshire is that attorney's fees do not automatically flow in favor of a prevailing civil litigant." Guaraldi d/b/a Century 21 Guaraldi Agency v. the Trans-Lease Group, 136 N.H. 457, 462 (1992) (citations omitted). "[F]ees may be awarded only by virtue of statutory authorization, an agreement between the parties, or an established exception." Id. (citations and internal quotations omitted). Exceptions include instances "where litigation is instituted or unnecessarily prolonged through a party's oppressive, arbitrary, capricious or bad faith conduct and cases in which parties are forced to litigate against an opponent whose position is patently unreasonable." Daigle v. City of Portsmouth, 137 N.H. 572, 574 (1993) (citations and internal quotations omitted).

"A party pursues a claim in bad faith if the claim is frivolous . . .[meaning] lack[ing] any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be." Kukene v. Genualdo, 145 N.H. 1, 3 (2000) (citations omitted). "A plaintiff's motive in bringing an action . . . does not determine whether an action is frivolous. The question is whether litigation was 'unnecessary' because the claim was meritless." Id. at 6 (citations and internal quotations omitted). The New Hampshire Supreme Court has also described bad faith litigation as "actions in which parties are forced to litigate in order to enjoy what a court has already decreed." King v. Mosher, 137 N.H. 453, 457 (1993) (citation and internal quotations omitted).

Considering this legal landscape, the Court finds that an award of attorney's fees has not been shown to be here appropriate. Stone's motive in

bring suit is not determinative. See Kukene, 145 N.H. at 6. The fact that two of his five claims have been at least conditionally dismissed certainly does not make them inherently frivolous. See Clipper Affiliates v. Checovich, 138 N.H. 271, 279 (1994). Nor does this Court consider Stone's unsuccessful claims to be patently unreasonable. Stone's judicial dissolution claim centered upon an issue of first impression in New Hampshire, the definition of the term "illegal" in RSA 293-A:14.30. The Court was required to turn to the Model Business Corporation Act, the legislative history of RSA 293-A:14.30, and a review of authority in other jurisdictions to analyze this claim, and cannot find Stone's interpretation of this law to be patently unreasonable. Further, while Stone's first breach of contract claim turned on an interpretation of the 1995 shareholder's agreement which the Court ultimately rejected, the interpretation was not so clearly unreasonable as to merit attorney's fees. Accordingly, N.E. Docs' motion for attorney's fees is DENIED.

SO ORDERED.

01-11-07
Date

John M. Lewis
Presiding Justice